Docket No. 02-607

Supreme Court, U.S.
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IN THE

United States Supreme Court

JOHN B. BELL,

Petitioner,

v.

THE STATE OF NEW YORK, CHEMICAL BANK and CHASE MANHATTAN BANK, N.A.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT JPMORGAN CHASE BANK IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

J.P. MORGAN CHASE LEGAL DEPARTMENT
Attorneys for Respondent
JPMORGAN CHASE BANK, formerly known as Chemical Bank and The Chase Manhattan Bank
One Chase Manhattan Plaza, 26th Floor
New York, New York 10081
212-552-0949

Of Counsel:

Manuel W. Gottlieb

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THE INSTANT PETITION IS BARRED ON NUMEROUS GROUNDS

Respondent JPMorgan Chase Bank, formerly known as The Chase Manhattan Bank and Chemical Bank, and successor in interest by merger to The Chase Manhattan Bank, N.A. ("Chase")[1], submits this Brief in Opposition to the petition for a writ of certiorari of Petitioner John B. Bell ("Petitioner" or "Bell").

Petitioner is an obsessed litigant[2] who has been blindly pursuing a meritless and long-resolved student loan-related claim against Chase and certain entities of the State of New York for almost two decades, the last thirteen years of which have constituted meritless attempted relitigation

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[1] Although named as a defendant in the caption, The Chase Manhattan Bank, N.A., which was merged into Chemical Bank in 1996, never had any dealings with Petitioner, whose twenty years of redundant and frivolous student loan-related litigation has been solely against the entity originally named Chemical Bank, which was subsequently renamed The Chase Manhattan Bank and later JPMorgan Chase Bank.

[2] In the precise words of Judge Allen G. Schwartz of the United States District Court for the Southern District of New York in his Opinion and Order below:

> Plaintiff has litigated for seventeen years in state and federal courts concerning his twenty-five-year old student loan debt. The slew of persistently adverse decisions that has resulted do not, as plaintiff contends, establish the venality of his opponents, the collusion of the Attorney General's office, or the contumacious obtuseness of the judiciary, but rather evinces the meritlessness of plaintiff's claim and the frivolity of plaintiff's repeated applications for relief.

See Opinion and Order dated September 2, 2000, 99 Civ. 5809 (AGS) (2000), pages A-3 to A-20 of Petitioner's Appendix, at A-19 to A-20.

of final 1989 rulings by the New York Court of Appeals denying and/or dismissing Bell's appeals from summary judgment decisions rendered against him as long ago as 1987.[3] Bell's present petition for a writ of certiorari is, consequently, not simply frivolous, but actively abusive, for at least the following reasons:

1. Petitioner's student loan-related claims against Chase were definitively resolved against him on summary judgment in *John B. Bell v. New York Higher Education Assistance Corporation*, 138 Misc. 2d 936, 526 N.Y.S. 2d 319 (Sup. Ct. N.Y. Co. 1987), *aff'd* 145 A.D. 2d 1006, 538 N.Y.S. 2d 451 (1st Dep't 1988), *appeal dismissed in part, denied in part*, 74 N.Y. 2d 623, 541 N.Y.S. 2d 979 (1989). Similarly, Bell's claims against Chase's co-defendant New York State Higher Education Services Corporation ("NYSHESC")[4] were resolved against him at the same time, 138 Misc 2d 939, 526 N.Y.S. 2d 316 (Sup. Ct. N.Y. Co. 1987) *aff'd*, 144 A.D. 2d 1047, 533 N.Y.S. 2d 642 (1st Dep't 1988), *appeal dismissed* 72 N.Y. 2d 871, 537 N.Y.S. 2d 493 (1989), *appeal denied*, 74 N.Y.2d 601, 541 N.Y.S. 2d 984 (1989). Bell's student loan-related claims, consequently, have been res judicata for thirteen years.

2. Refusing to accept these clear and definitive final judgments rendered against him by the New York courts, Bell instead attempted, for almost another entire decade, to relitigate these adverse judgments up and down the New York State court appellate ladder, for which he has repeat-

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[3] Bell has never repaid the loan in question, nor has any enforcement action ever been taken against him.

[4] Bell's original caption incorrectly named NYSHESC as "New York State Higher Education Assistance Corporation".

edly been sanctioned. By order dated October 1, 1997 (Petitioner's Appendix, A-23 to A-26), the Honorable Elliott Wilk, Justice, Supreme Court, New York County—the Justice who issued the 1987 summary judgment decisions against Bell—entered a permanent injunction order specifically barring Bell, on res judicata grounds, from further frivolous relitigation of his student loan claims. In 1998 that order was affirmed by the Appellate Division, First Department, which stated that "[t]he motion court correctly ruled that plaintiff's claims are barred by the doctrine of res judicata, and, in view of plaintiff's dilatory and frivolous tactics over the long history of this litigation, properly granted injunctive relief," and the New York Court of Appeals dismissed Bell's appeal therefrom. 250 A.D.2d 496, 671 N.Y.S. 2d 975 (1st Dep't), *appeal dismissed*, 92 N.Y.2d 877, 677 N.Y.S.2d 783 (1998). Subsequently, relying on Justice Wilk's 1997 order and its affirmations, the Appellate Division, Third Department affirmed the New York Court of Claims' 1999 dismissal (CM-60399, Ct. Clms, Oct. 15, 1999) of yet another Bell action on the same student loan, stating that "the Court of Claims appropriately found that the present claim is barred by the permanent injunction and the principles of res judicata." *John B. Bell v. The State of New York*, 277 A.D. 2d 854, 716 N.Y.S. 2d 818 (3d Dep't 2000), *appeal dism'd*, 96 N.Y.2d 746, 722 N.Y.S. 2d 128 (2001). Justice Wilk's order and its affirmances, and the New York courts' determinations that Bell's claims are res judicata, are entitled to preclusive effect at bar on principles of Full Faith and Credit and comity.

3. As Judge Schwartz ruled below, plaintiff's present claim is barred by the *Rooker-Feldman* doctrine (*District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462,

476 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923)), which bars a Federal District Court from acting as an appellate court over state court decisions because the State court decisions purportedly were wrong.[5]

4. Nor is this Bell's first attempt to seek relief from the Federal courts, the Second Circuit, and even this Court, by miscasting his State court defeats as violations of 42 U.S.C § 1983. In 1985 Judge Broderick of the United States District Court for the Southern District of New York, in *John B. Bell v. The State of New York and New York Law School*, 85 Civ. 5639 (VLB)[6] dismissed Bell's prior § 1983 claim,[7] on the grounds that all Bell was attempting to do was to "constitute this court, a Court of Appeals over what the state court has done" by wrongly attacking those state court decisions on purported "constitutional" grounds. Judge Broderick also granted sanctions against Bell by order dated December 20, 1985. The Second Circuit affirmed, by order dated March 23, 1985 (Respondent's Appendix, R.A.-1 to R.A.-3), stating: "Judge Broderick . . . properly ruled that Bell's allegations were completely frivolous and were wholly unavailing to state a cognizable

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[5] The Second Circuit subsequently dismissed Petitioner's appeal, on motion, as frivolous pursuant to 28 U.S.C. § 1915(d)(2)(B)(i). *See* Petitioner's Appendix, A-1 to A-2.

[6] Insofar as Judge Schwartz quoted extensively (*see* Petitioner's Appendix A-15 to A-16, n.6) from Judge Broderick's 1985 decision, Chase will not burden the Court with inclusion of that decision here. The decision, of course, is in the Record.

[7] Bell claimed in 1985 that the State court's dismissal of his claim against then co-defendant New York Law School on limitations grounds gave rise to a § 1983 violation, just as he claims here that a dismissal now on res judicata grounds gives rise to the same type of spurious § 1983 claim.

claim pursuant to 42 U.S.C. § 1985" (*id.*, R.A.-2). This Court denied Bell's prior petition for a writ of certiorari, 479 U.S. 854, 107 S. Ct. 190, 95 L. Ed. 2d 123 (1986), and also denied Bell's motion for a rehearing, 479 U.S. 1001, 107 S. Ct. 613, 95. Ed. 2d (1986). On the separate ground of collateral estoppel, therefore, Bell cannot maintain this latest iteration of his twenty-year old, fully resolved claim.

5. Finally, as discussed below, Bell secured his extension of time in which to file the instant petition for a writ of certiorari by misrepresenting to this Court the timing and circumstances of the Second Circuit's rulings. The instant petition is, therefore, jurisdictionally defective because time-barred as well.

ARGUMENT

I. THE DECISIONS BELOW CORRECTLY DISMISSED BELL'S CLAIM INITIALLY UNDER THE ROOKER-FELDMAN DOCTRINE AND SUBSEQUENTLY ON APPEAL AS FRIVOLOUS

Judge Schwartz dismissed Bell's complaint (Opinion and Order dated September 6, 2001, Petitioner's Appendix A-3 to A-20), for lack of subject matter jurisdiction pursuant to the *Rooker-Feldman* Doctrine—that is, on the same basis on which Judge Broderick had dismissed Bell's prior § 1983 claim in 1985—*i.e.*, because, as this Court stated in *Feldman*, 460 U.S. at 483, n.15, where "the District Court is in essence being called upon to review the state court decision" in a situation in which "claims

presented to a United States District Court are *inextricably intertwined* with the state court's [determination]," the District Court lacks jurisdiction to conduct such a review. Judge Schwartz found that "[h]ere, plaintiff's claims are 'inextricably intertwined' with the state court judgment because the essence of plaintiff's claims is that the state court judgment was 'procured fraudulently'" (Petitioner's Appendix, A-13). As Judge Schwartz summed up:

> Plaintiff, in alleging that defendants misleadingly remained silent or fraudulently advanced certain arguments with the intent of unlawfully interfering with state court adjudication, implicitly asks this court, in contravention of the Rooker-Feldman doctrine, to reverse the state court's judgment . . . . Consequently, plaintiff's claims alleging that the state court judgments were wrongfully procured are barred by the Rooker-Feldman doctrine . . . . (citations omitted) (Petitioner's Appendix, A-14 to A-15).

Judge Schwartz went on (*id.*, A-15) to cite the substantial case law authority that a plaintiff may not evade *Rooker-Feldman* merely by claiming a § 1983 violation (*see, e.g., Allen v. McCurry*, 449 U.S. 90, 94-96, 101 S. Ct. 411, 414-15, 66 L. Ed. 2d 308 (1980)). Nothing articulated by Bell either below or on the instant certiorari petition even suggests the possibility of any contrary result here. All Bell is attempting to do at bar is to assert that, both prior to the final decisions against him in 1987-1989, and subsequent to them, in the dreary decade of abusive attempted relitigation to which he subjected the defendants, the latter somehow misled the State court. Even putting aside the unsupported and totally meritless nature of

these allegations,[8] the District Court correctly ruled that *Rooker-Feldman* bars any further relitigation in the Federal courts based on such allegations.[9]

The Second Circuit, by Order dated October 16, 2001 (Petitioner's Appendix, A-1 to A-2), granted respondents' motions to dismiss the appeal as frivolous pursuant to 28

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[8] The essential crux of petitioner's entire argument (Petition at 7-8) on this issue is that the New York State Supreme Court's rulings were *incorrect* because defendants "hid" from that court the fact that the New York Court of Claims had previously ruled otherwise in 1986 —*i.e.*, that NYSHESC was not a State agency. But the Supreme Court, New York County and the Court of Claims are trial courts of first instance, at the same judicial level, from which appeals go respectively to the First and Third Appellate Divisions. (The latter two appellants courts, it should be noted, have both agreed that Bell's claims are res judicata.) The fact that Justice Wilk and the Court of Claims may have reached different conclusions neither indicates that Justice Wilk was not aware of contrary authorities—in fact, he even explicitly *acknowledged* the existence of such contrary authority in his decision, 138 Misc.2d at 934, 526 N.Y.S.2d at 318—*nor* does it mean that he was wrong. But, of course, as discussed below, under all applicable law it would not matter even *had* he been wrong, either under *Rooker-Feldman* or applicable principles of res judicata. Similarly, Petitioner's invocation of legal positions taken by NYSHESC years *later* in opinion letters written for non-litigation purposes certainly does not invalidate Justice Wilk's 1987 decisions, nor suggest any basis for attacking his grant of summary judgment either to NYSHESC or, especially, to Chase, which admittedly only followed NYSHESC's regulations.

[9] As has often been the case with Petitioner, it is frequently not easy to determine exactly what he is appealing *from*. Technically, Bell's appeal dates not from Judge Schwartz's September 6, 2000 dismissal Opinion and Order, but from the Judge's Memorandum Order of April 29, 2001 denying petitioner's Federal Rule 60(b) motion. A copy of that order, which Petitioner does not append, is attached hereto as Respondent's Appendix R.A.-4 to R.A.-7.

U.S.C. § 1915(d)(2)(B)(i). In the light of the sorry history of this litigation, briefly summarized above and more fully by Judge Schwartz (*see* Petitioner's Appendix, A-4 to A-9), it cannot conceivably be argued that this was an incorrect result under applicable law.

II. RES JUDICATA, FULL FAITH AND CREDIT AND PRINCIPLES OF COMITY ALSO REQUIRE DENIAL OF BELL'S PETITION

A. Both The Decisions On The Merits Of 1987-1989 And The Orders Of 1997 And 1998 Barring Further Relitigation Of Bell's Claim On Res Judicata Grounds Are Entitled To Full Faith And Credit In This Court

Not only the Full Faith and Credit Clause of the Constitution, Article IV, § 1, and 28 U.S.C. § 1738 (1995 & Supp. 2000) ("State and Territorial Statutes and judicial proceedings; full faith and credit"), but the "general federal law of res judicata"—*see, e.g., Winters v. Lavine*, 574 F.2d 46, 54-56 (2d Cir. 1978)—and principles of comity require that (a) Justice Wilk's 1987 summary judgment decisions, and the 1988-1989 affirmances thereof, dismissing Bell's claims based on his student loan agreement against Chase and NYSHESC on the merits, and (b) Justice Wilk's 1997 Order barring Bell from further relitigation on res judicata grounds, the Appellate Division's 1998 affirmance thereof, and the New York Court of Appeals' dismissal of the appeal therefrom, be given Full Faith and Credit.

Under 28 U.S.C. § 1738, a Federal court is required to give the same preclusive effect to a state court judgment as

another court of that state would give. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523, 106 S. Ct. 768, 771, 88 L. Ed. 887 (1986); *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892, 896, 79 L. Ed. 56 (1984) (same); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466-67, 102 S. Ct. 1883, 1889-90, 72 L. Ed. 2d 262 (1982) (federal court action would be precluded by prior state court judgment because action would be precluded in state in which judgment rendered); *Allen v. McCurry*, 449 U.S. at 94-96, 101 S. Ct. at 414-15, 66 L. Ed. 2d 308 (notions of comity, the need to prevent vexatious litigation, and a desire to conserve judicial resources underlie preclusive effect given to prior state court judgments).

Specifically, the State courts' own determination that res judicata bars Bell's claims should *itself* be held dispositive: "the Full Faith and Credit Act requires that federal courts give the state-court judgment, *and particularly the state court's resolution of the res judicata issue*, the same preclusive effect it would have had in another court of the same State." *Parsons Steel*, 474 U.S. at 525, 166 S. Ct. at 772, 88 L. Ed. 2d 887 (emphasis added). Consequently the validity of Justice Wilk's order barring further vexatious relitigation by Bell on res judicata grounds, and its affirmances, should be recognized by this Court as well.

Although Judge Schwartz did not base his dismissal of Bell's complaint on res judicata grounds because he concluded that under *Rooker-Feldman* he lacked jurisdiction even to reach that ground, nevertheless he made it clear that he had determined that, were he to reach the issue, res judicata principles also would bar any such suit:

Plaintiff's claims against Chemical and Chase would be precluded by the doctrine of res judicata. The doctrine of res judicata provides that "a final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were or could have been raised in the action." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *Maharaj v. BankAmerica Corp.*, 128 F.3d 94, 97 (2d Cir. 1997); *see* 28 U.S.C. § 1738 (applying full faith and credit to state court judgments). Because New York is the state in which the original action was filed, the Court must apply New York's preclusion rule, which states: "If claims arise out of the same factual grouping, they are deemed to be part of the same cause of action and the later claim will be barred without regard to whether it is based upon different legal theories or seeks different or additional relief." *Bal [v. New York City Loft Bd.]*, 2000 WL890199, *3. Here, there was a final judgment on the merits in state court on the claims against Chemical. Chemical was awarded summary judgment and plaintiff meticulously exhausted all of his appeals. Additionally, it is undisputed that Chase, which acquired Chemical and is Chemical's successor in interest, is Chemical's privy.[10] Plaintiff is precluded from asserting any claims in this action against Chemical or its privy

[10] In actual fact, Chemical acquired Chase and, as the survivor corporation, was renamed The Chase Manhattan Bank. Subsequently, Chase, the renamed Chemical, acquired Morgan Guaranty Trust Company and was renamed again, this time JPMorgan Chase Bank. Therefore it is even simpler than Judge Schwartz stated: Petitioner has been litigating with the same corporate entity, originally named Chemical Bank, for twenty years.

Chase that were or could have been raised in the state court action. Plaintiff's claims against Chemical and Chase concern the constitutionality of 8 N.Y.C.R.R. § 2104.4, the applicability of form HE 700, and the validity of Chemical's and Chase's arguments pertaining thereto. All of these contentions were raised or could have been raised before the New York State Supreme Court in 1987. Plaintiff presents no legal support for a contrary conclusion. Finally, plaintiff's claims in this action arise out of the same factual grouping, specifically, the dispute surrounding the repayment of plaintiff's 1975 student loan. Consequently, assuming arguendo that the Court were to have subject matter jurisdiction over plaintiff's claims against Chase and Chemical, such claims would be precluded under the doctrine of res judicata. (Petitioner's Appendix, A-18 to A-19, n.7).

B. The State Courts Correctly Applied New York Res Judicata Principles In This Matter

In *Migra*, 465 U.S. at 81, 104 S. Ct. at 896, 79 L. Ed. 2d. 56, this Court held that the res judicata effect of state court decisions in § 1983 actions is a matter of state law. *Heck v. Humphrey*, 512 U.S. 477, 480 n.2, 114 S. Ct. 2364, 2369 n.2, 129 L. Ed. 2d 383 (1994) (same); *see Kulak v. The City of New York*, 88 F.3d 63 71 (2d Cir. 1996) (whether plaintiff's subsequently-asserted § 1983 claims can be maintained must be analyzed in light of New York issue preclusion law); and, as noted above, in *Parsons Steel*, 474 U.S. at 525, 106 S. Ct. at 772, 88 L. Ed. 2d 887, this Court further held that a state court's determination as to the res

judicata effect of its decisions is *itself* entitled to Full Faith and Credit.

It should be noted further that applicable law does *not* require the prior State court decision to have been *correct* for it to have preclusive effect. *Nemaizer v. Baker*, 793 F.2d 58 (2d Cir. 1986). This is true of civil rights claims as well, *Allen v. McCurry*, 449 U.S. at 101, 101 S. Ct. at 418, 66 L. Ed. 2d 308 (the fact that § 1983 was intended to protect persons who had not had a full and fair opportunity to litigate an issue "lends no strength to any argument that Congress intended to allow relitigation of federal issues decided after a full and fair hearing in a state court simply because the state court's decision may have been erroneous"). Nevertheless, in this case, as discussed below, the State courts' determinations clearly *were* correct.

Bell's 1983 claim that Chemical wrongfully entered a default on his student loan in explicit conformity with the rules set forth in the NYSHESC handbook cannot be relitigated merely because he has added the allegations that NYSHESC's requirements were unconstitutionally promulgated by the latter[11] or that (a) Chase's reliance on these Rules, and (b) its assertion of valid affirmative defenses in the State court action, somehow create a federal § 1983 claim. The only possible result under the New York law of

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[11] Bell's belated "constitutional" challenge to withdrawn 8 NYCRR 2104.4 is, of course, precisely the type of State law question which the Second Circuit would certify to the New York Court of Appeals for resolution (Second Circuit Rules § 0.27), and the New York Court of Appeals would determine whether to consider under Court of Appeals Rule § 500.17. Here, of course, the New York Court of Appeals has refused to review this question on numerous redundant "appeals" by Bell.

res judicata, which is itself consistent with the position articulated in the Restatement (Second) of Judgments § 24 (2d Ed. 1982), is that Bell's claims, however he attempts to camouflage them, are barred:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.[12]

In *Reilly v. Reid*, 45 N.Y.2d 24, 407 N.Y.S.2d 645 (1978), the New York Court of Appeals analyzed the issue of what constituted "the same cause of action" for res judicata purposes. In its analysis, the Court stated:

> A cause of action may denote one of several separately stated claims in a pleading based on the same congeries of facts but related to different legal theories of recovery. A 'cause of action' may also denote a separately stated claim on the same congeries of facts, but for different legal relief. But even if there are variations in the facts alleged, or different relief is sought, the separately stated 'causes of action' may nevertheless be grounded on the same gravamen of the wrong upon which the action is brought. In the sense of res judicata or claim preclusion, although there may be

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[12] This Restatement test has been adopted by various federal courts, including the Second Circuit. *See Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 39 (2d Cir. 1992), *cert. denied*, 506 U.S. 1053, 113 S. Ct. 977, 122 L. Ed. 2d 131 (1993); 18 *Moore's Federal Practice* § 131. 20[2] (1999).

> separately stated or statable causes of action, they are nevertheless based on the 'same cause of action' . . . . *Nor will differences in legal theory generally avail to permit relitigation of claims based on the same gravamen.* . . . (emphasis supplied).

45 N.Y.2d at 29, 407 N.Y.S.2d at 648. The Court of Appeals concluded that "where the same foundation facts serve as a predicate for each proceeding, differences in legal theory and consequent remedy do not create a separate cause of action." 45 N.Y.2d at 30, 407 N.Y.S.2d at 649.

In *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 445 N.Y.S.2d 687 (1981), the Court of Appeals held that a trespass claim arose out of the same transaction as did a *de facto* appropriation claim, and consequently was barred:

> [O]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy. . . . When alternative theories are available to recover what is essentially the same relief for harm arising out of the same or related facts such as would constitute a single 'factual grouping' . . . the circumstance that the theories involve materially different elements of proof will not justify presenting the claim by two different actions. . . .

54 N.Y.2d at 357-58, 445 N.Y.S.2d at 688-89 (citations omitted). *See Smith v. Russell Sage College*, 54 N.Y.2d 185, 192, 445 N.Y.S.2d 68, 71 (1981) (". . . in deciding res judicata issues, we have moved to a more pragmatic test, which sees a claim or cause of action as 'coterminous

with the transaction regardless of the number of substantive theories or variant forms of relief . . . available to the plaintiff' ").

It could not be clearer from the above authority that under applicable New York precedents Bell's student loan-related claims have been finally dismissed, and no newly minted legal theory can serve to resuscitate them. Petitioner's entire argument regarding res judicata (Petition at 5-16) is based on his refusal to recognize this fundamental principle of law—*i.e.*, that the decisions of 1987-1989 were final as to his asserted claims, and that his subsequent change of legal theories cannot alter the fact that those claims are res judicata. Bell argues instead that, years after the decisions against him became final, when he sought to revive those claims on the basis of spurious "new evidence," and the New York courts refused to allow him to do so, certain "unresolved issues" thereby came into existence and, somehow, became a part of the original litigation, which (somehow) renders the prior final decisions non-final.

Consequently, as Bell would have it, his entire decade-plus of subsequent relitigation efforts is simply part of the *same* litigation he originally filed in 1983, and thus res judicata cannot apply, because it is all *one proceeding* (Petition at 12-13). In reliance on this dizzying bootstrap argument, a deliberate misreading of all applicable law, Bell cites (*id.* at 12) New York Civil Practice Law and Rules ("CPLR") § 5015, which simply states that "[t]he court which rendered a judgment or order *may* relieve a party from it upon such terms as may be just. . . ." (emphasis supplied). Bell, however, interprets CPLR § 5015 as

requiring such a result, which even the language of the statute itself belies.

In sum, case law defining res judicata in the New York State courts specifically bars Bell's attempt to relitigate yet again an already determined claim for relief merely by employing an ostensibly new legal theory to dress up the same tired factual claim. Both the original dismissals of Bell's claims and their affirmances by the State courts, and the orders of Justice Wilk and the Appellate Division, permanently barring Bell from further relitigation of his student loan claim on res judicata grounds, not only require Full Faith and Credit and acceptance on grounds of comity by this Court, but are themselves entirely consistent with New York law.

C. The State Court Orders Barring Further Relitigation Of Bell's Claim On Res Judicata Grounds Are Consistent With Federal Decisional Law As Well

Even though, as noted above, in *Migra*, 465 U.S. at 81, 104 S. Ct. at 896, 79 L. Ed. 2d 56, this Court has held that the res judicata effect of State court decisions is a matter of State law, it should nevertheless be noted that Federal decisional law would require precisely the *same* result as that reached by the State courts which have dealt with Bell's endless attempts to relitigate his finally resolved claim, and those decisions would extend to this latest attempt to recast his claim as a bogus § 1983 claim as well. *Allen v. McCurry*, 449 U.S. at 101, S. Ct. at 418, 66 L. Ed. 2d 308.

"New legal theories do not amount to a new cause of action so as to defeat the application of the principle of res judicata." *In re Teltronics Servs., Inc.*, 762 F.2d 185, 193 (2d Cir. 1985). "To indulge" a plaintiff's "lavish desire" to relitigate on "nothing more than a new legal formulation of the very dispute resolved by [the] . . . original decision" would be "an acquiescence in the abuse of the judicial process." *Schmieder v. Hall*, 545 F.2d 768, 771 (2d Cir. 1976), *cert. denied*, 430 U.S. 955, 97 S. Ct. 1601, 51 L. Ed. 2d 805 (1977). "Whatever legal theory is advanced, when the factual predicate upon which claims are based are substantially identical, the claims are deemed to be duplicative for purposes of res judicata", *Woods v. Dunlop Tire Corp.*, 972 F.2d at 39, *quoting Berlitz Sch. Of Languages of Am., Inc. v. Everest House*, 619 F.2d 211, 215 (2d Cir. 1980); *Expert Elec., Inc. v. Levine*, 554 F.2d 1227, 1234 (2d Cir.), *cert denied*, 434 U.S. 903, 98 S. Ct. 300, 54 L. Ed. 2d 190 (1977) ("For it is the facts surrounding the transaction or occurrence which operate to constitute the cause of action, not the legal theory upon which a litigant relies"). Or, as the Ninth Circuit put it in *Lea v. Republic Airlines, Inc.*, 903 F.2d 624, 634 (9th Cir. 1990), where it was asserted that in the first action between the parties plaintiff's counsel "did not happen to think of the theory he now advances" in the subsequent action, "[o]versight erects no bar [to] res judicata with respect to those claims that could have been pursued in the earlier litigation." Similarly, as stated in *Doe v. Allied Signal, Inc.*, 985 F.2d 908, 913 (7th Cir. 1993), "[a] plaintiff may not avoid an earlier judgment on the merits by merely concocting a new legal theory."

III. BELL'S PETITION IS ALSO SUBJECT TO DENIAL ON COLLATERAL ESTOPPEL GROUNDS AS WELL

As noted above, in 1985 Bell commenced an action, entitled *John B. Bell v. The State of New York and New York Law School*, in the United States District Court for the Southern District of New York (85 Civ. 5639 (VLB)), also purportedly pursuant to 42 U.S.C. §§ 1983 and 1985, alleging that in his then still-pending State court student loan action his claims against then co-defendant New York Law School had wrongly been dismissed on statute of limitations grounds, because the mere *assertion* of the limitations defense in State court constituted a § 1985 violation. As Judge Schwartz noted (Petitioner's Appendix, A-15 to A-16, n.6), in 1985 Judge Broderick rejected Bell's attempt to cobble together a bogus § 1983 claim merely to circumvent that adverse State court ruling. Judge Broderick's 1985 oral and written dismissal decision and orders were affirmed in 1986 by the Second Circuit (Respondent's Appendix, R.A.-1 to R.A.-3).

Bell now attempts, more than seventeen years later, to appeal the dismissal of his most recently asserted § 1983 civil rights claim, a claim based once again simply on the defendants' having successfully defended the same twenty-year old claim, this time on res judicata grounds, in the state courts. In *Blonder-Tongue Labs., Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328, 91 S Ct. 1434, 1442, 28 L. Ed. 2d 788 (1971), this Court, deciding the "broader question" of "whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue," stated that permitting repeated litigation of the same issue against different

defendants "reflects either the aura of the gaming table or a 'lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure' ", *quoting Kerotest Mfg. Co. v. C-O-Two Co.*, 342 U.S. 180, 185, 72 S. Ct. 219, 222, 96 L. Ed. 200 (1952).

The instant matter presents a similar question of the appropriateness of "defensive" collateral estoppel to preclude Bell from relitigating precisely the same type of bogus § 1983 claim as was resolved in the earlier action, relating to the same transaction. *See Kulak*, 88 F.3d at 72 (summary judgment affirmed where plaintiff could not demonstrate that issue preclusion doctrine should not bar him from relitigating his claims). As Judge Schwartz stated below (Petitioner's Appendix, A-16, n. 6): "For the same reasons, this action must likewise be dismissed."

IV. BELL'S PETITION IS UNTIMELY BECAUSE HE MISREPRESENTED TO THIS COURT THE SEQUENCE AND TIMING OF THE SECOND CIRCUIT'S RULINGS

Petitioner secured an extension of time in which to file his present petition by misrepresenting to this Court the procedural history in the Second Circuit. All Bell states in his Petition (at 2) on this subject is "The Court of Appeals decided my case on October 16, 2001 and the time to file a writ of certiorari was extended by the Honorable Justice Ginsburg, to and including July 22, 2002, on May 8, 2002 in Application No. 01A 856." While, strictly speaking, this capsule summary is itself true, Petitioner's *application* for an extension of time in which to file his Petition was based entirely on misrepresentation, as follows.

On Bell's appeal to the Second Circuit from Justice Schwartz's April 29, 2001 denial of Bell's Rule 60(b) motion for rescission and vacation of the District Court's September 26, 2000 dismissal order (Respondent's Appendix, R.A.-4 to R.A.-7), the Second Circuit, by Order dated October 16, 2001, dismissed Bell's appeal as frivolous pursuant to 28 U.S.C. § 1915(d)(2)(B)(i) (Petitioner's Appendix, A-1 to A-2).

Upon that Second Circuit dismissal, Bell filed a Motion for Modification of [that] Court's Order of 10/16/01 to Reinstate the Appeal, Pursuant to FRAP 27(a)(3)(b), dated November 1, 2001 (Respondent's Appendix, R.A.-8 to R.A.-11). The Second Circuit denied that motion by order dated *January 4, 2002* (*id.*, R.A.-10). Significantly, Petitioner does not now, and did not earlier, on his motion to this Court for an extension of time, provide a copy of this first order denying reargument and/or vacation of the October 16, 2001 dismissal order. Bell's time to file a petition for writ of certiorari with this Court accordingly expired ninety days after the date of that initial decision, January 4, 2002—that is, on *April 5, 2002*.

Supreme Court Rule 13.3 states in pertinent part that:

> 3. The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). *But if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties* (whether or not they requested rehearing or joined in the petition of rehearing) *runs from the date of the denial of the peti-*

> *tion for rehearing* or, if the petition for rehearing is granted, the subsequent entry of judgment.

(Emphasis supplied).

Bell, however, as usual refusing to accept the Second Circuit's January 4, 2002 denial of his modification motion, filed, on January 20, 2002, another redundant and extraneous motion, styled as a "*Renewal* Motion for Modification of [that] Court Order of 10/16/01 to Reinstate the Appeal Pursuant to FRAP 27(a)(3)(b)" (Respondent's Appendix, R.A.-12 to R.A.-14; emphasis supplied). In that "renewal" motion, Bell conceded (*see* Respondent's Appendix, R.A.-13) that "[a] previous application for the relief requested herein has been made to this Court"—that is, the motion denied by the Second Circuit by its Order dated January 4, 2002.

The Second Circuit also denied Bell's renewal motion for modification of the October 16, 2001 Order, this time on February 21, 2002. *See* Petitioner's Appendix, A-21 to A-22. As of that date, therefore, Bell *still* had remaining the period from February 21, 2002 to April 5, 2002 (the latter date being ninety days from the January 4, 2002 order denying his initial reargument motion) in which to file his certiorari petition, and almost as long (*see* below) to file a timely motion for an extension of time to file his petition. He did neither.

Instead, Bell filed an extension motion (R.A.-15) dated April 30, 2002—twenty-five days too late—in which filing he misrepresented to this Court the timing of the Second Circuit's rulings. Thus Petitioner stated in his affidavit in support of that motion (Respondent's Appendix, R.A.-16 to R.A.-23) that: "[p]etitioner respectfully requests that

since the fundamental issues involved in the State court action are now under consideration by OCA [the New York Office of Court Administration] *that petitioner's time in which to file a writ of certiorari be extended, from May 21, 2002 to August 21, 2002 . . . .*" (*id.*, R.A.-23; emphasis supplied.) But this completely misstates the applicable time period, which allowed (Supreme Court Rule 13.1) filing of a petition for a writ of certiorari in this case only through April 5, 2002 (90 days from the January 4, 2002 Second Circuit Order, *not* May 21, 2002). The Rule further permits such a request for an extension of time only "[f]or good cause,"[13] and then only when made prior to ten days before the expiration of that period (Rule 13.5) unless there are "extraordinary circumstances." Bell's untimely motion was thus approximately a month late under Rule 13.5. That Rule not only explicitly states that "[a]n application to extend the time to file a petition for a writ of certiorari is not favored," but mandates that "[t]he application *must* be received by the clerk *at least 10 days before the date the petition is due*, except in extraordinary circumstances" (emphasis supplied).

Bell's motion, however, was dated (R.A.-23) twenty-five days *after* his petition was due, and "extraordinary circumstances" "clearly consists of more than the 'good cause' that must be shown for an extension requested *prior* to the final 10 days of the period," 12 *Moore's Federal Practice* § 530.03[1] (Matthew Bender 3d Ed. 2002)

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[13] Bell's sole representation on the subject of "good cause" is that the Office of the Governor of New York had referred a new Bell letter demanding "redress" to the New York Office of Court Administration—that is, to the administrative office of the very court system Bell has abused for so long, and which has repeatedly sanctioned him for doing so.

(emphasis supplied). Clearly no such "extraordinary circumstances" existed here.

In the light of Bell's twenty years of frivolous litigation and abusive relitigation of this entirely res judicata matter, this misrepresentation is hardly his greatest sin. Nevertheless, his petition for a writ of certiorari is jurisdictionally defective because untimely; this Court's grant of an extension of time in which to file his petition was secured solely by means of Petitioner's misrepresentation; and counsel for Chase points this out as required by Supreme Court Rule 15.1: "Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition."

CONCLUSION

For all of the above reasons, it is submitted that this Court should deny Bell's petition for a writ of certiorari, which is utterly without any vestige of merit.

Dated: New York, New York
November 21, 2002

Respectfully submitted,

J.P. MORGAN CHASE LEGAL DEPARTMENT

By: /s/ Manuel W. Gottlieb

Manuel W. Gottlieb (MG - 7129)
Attorneys for Defendant
J.P. Morgan Chase Bank, formerly known as The Chase Manhattan Bank and Chemical Bank
One Chase Manhattan Plaza, 26th Floor
New York, New York 10081
(212) 552-0949

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

85-7893

Filed Mar. 28, 1986

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of March one thousand nine hundred and eighty-six.

Present:

HONORABLE IRVING R. KAUFMAN,
HONORABLE WILLIAM H. TIMBERS,
HONORABLE THOMAS J.MESKILL,

Circuit Judges.

JOHN B. BELL,

Plaintiff-Appellant,

—against—

THE STATE OF NEW YORK, NEW YORK LAW SCHOOL, KRAMER, LEVIN, NESSEN, KAMIN, & FRANKEL, ESQS., ANDREA LIKWORNIK and MICHAEL B. REUBEN,

Defendants-Appellees.

MANDATE

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Bell contends the district court erred by dismissing his complaint for failure to state a claim. The appellant, however, provided no support for his assertion that the appellees had engaged in a conspiracy, and admitted that he had failed to allege a class-based discriminatory animus. Judge Broderick, therefore, properly ruled that Bell's allegations were completely frivolous and were wholly unavailing to state a cognizable claim pursuant to 42 U.S.C. § 1985. Accordingly, the complaint was correctly dismissed. Fed. R. Civ. P. 12(b)(6).

2. Bell also contends the district judge erred by imposing costs and attorneys' fees against him. Judge Broderick, however, on two occasions warned the appellant of the risk of sanctions and urged Bell to withdraw his complaint. In light of Bell's obdurate pursuit of his patently meritless claims, the fees and costs were fully warranted. *Gerena-Valentin* v. *Koch*, 739 F.2d 755, 761 (2d Cir. 1984); *see also Eastway Constr. Corp.* v. *City of New York*, 762 F.2d 243, 254 (2d Cir. 1985).

3. Accordingly, the judgment of the district court is affirmed.

4. Bell pursues the same frivolous points on appeal that he addressed to the district court. Accordingly, we award to the appellees double costs and attorneys' fees, pursuant to Fed. R. App. P. 38 and 28 U.S.C. § 1912. *See Mone* v. *Commissioner*, 774 F.2d 570, 574 (2d. Cir. 1985).

[STAMP]

Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in [ILLEGIBLE] cases before this or any other court.

/s/ IRVING R. KAUFMAN
Irving R. Kaufman,

/s/ WILLIAM H. TIMBERS
William H. Timbers,

/s/ THOMAS J. MESKILL
Thomas J. Meskill,
Circuit Judges.

[STAMP]

A TRUE COPY
ELAINE B. GOLDSMITH

/s/ ELAINE B. GOLDSMITH
Clerk

[STAMP]
THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 6-24-86.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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99 Civ. 5809 (AGS)
Filed Apr. 25, 2001

JOHN B. BELL,

Plaintiff,

—against—

THE STATE OF NEW YORK, CHEMICAL BANK and CHASE MANHATTAN BANK, N.A.,

Defendants.

MEMORANDUM ORDER

ALLEN G. SCHWARTZ, UNITED STATES DISTRICT JUDGE:

In an Opinion and Order dated September 6, 2000 (the "Order"), the Court dismissed the complaint in its entirety for lack of subject matter jurisdiction, pursuant to the Rooker-Feldman doctrine. On September 13, 2000, the Clerk of the Court entered judgment dismissing the action pursuant to the Order. Plaintiff now moves pursuant to Fed. R. Civ. P. 60(b) for, among other things, rescission and vacation of the Order. For the reasons set forth below, plaintiff's motion is denied.

Plaintiff does not specify under which subdivision of Rule 60(b) he seeks relief from judgment. The Court con-

strues the instant motion as being made pursuant to Rule 60(b)(6) because plaintiff's arguments do not appear to fall within the scope of subdivisions (1) through (5) of Rule 60(b). In addition, the State of New York characterized this as a Rule 60(b)(6) motion in its memorandum. (Mem. of Law on Behalf of State of New York in Opp. to Pl.'s Application to Vacate the J. at 4-6.) In his reply papers, plaintiff did not dispute that characterization, arguing instead that he met the criteria for application of Rule 60(b)(6). (Reply Aff. to State of New York's Opp. to the Rule 60B Mot. ¶¶ 2-3.)

Relief may be granted under Rule 60(b)(6) only in extraordinary circumstances. *Transaero, Inc. v. La Fuerza Area Boliviana*, 24 F.3d 457, 461 (2d Cir. 1994) (citing *Ackerman v. United States*, 340 U.S. 193, 1999 (1950)). Plaintiff claims that there are extraordinary circumstances because the defendants have allegedly violated his constitutional rights for over thirteen years. (Reply Aff. to State of New York's Opp. to the Rule 60B Mot. ¶3.) This is hardly extraordinary. Plaintiffs bringing actions for alleged civil rights violations commonly assert that their rights were violated. That does not entitle every non-prevailing civil rights plaintiff to relief under Rule 60(b)(6). Nor does plaintiff's contention that the Order is legally incorrect (Pl.'s Mem. of Law in Supp. of the Rule 60(B) Mot. at 10-16) establish extraordinary circumstances. *Matarese v. LeFevre*, 801 F.2d 98, 107 (2d Cir. 1986) ("The contention that the court's decision misapplied *Sandstrom* was inadequate, for a Rule 60(b)(6) motion may not be used as a substitute for appeal.") The Court finds nothing in the record warranting a finding that extraordinary circumstances are present here such that relief is appropriate

under Rule 60(b)(6). Accordingly, plaintiff's motion pursuant to Rule 60(b)(6) is denied.

The Second Circuit has held that, in certain circumstances, a Rule 60(b) motion should be treated as a motion under Fed. R. Civ. P. 59(e). *Jones v. UNUM Life Ins. Co. of Am.*, 223 F.23d 130, 136-37 (2d Cir. 2000). Even if the Court were to construe the instant motion as being made under Rule 59(e), the motion would fail. Rule 59(e) requires that a motion thereunder be made within 10 days, as calculated pursuant to Fed. R. Civ. P. 6(a). Judgment was entered in this action on September 13, 2000. The instant motion was apparently served on October 2, 2000.[1] (*See* Notice of Motion.) This is outside the ten-day period permitted by Rules 6(a) and 59(e). Accordingly, the motion would have to be denied as untimely if construed as a Rule 59(e) motion.

Moreover, even if the motion were timely served, plaintiff has not met the standards for alteration or amendment of a judgment. In order to prevail on a Rule 59(e) motion, the movant must show controlling decisions or factual matters that the court overlooked that might have materially influenced the prior decision. *E.g.*, *Griffiri Indus., Inc. v. Petrojam, Ltd.*, 72 F. Supp. 2d 365, 368 (S.D.N.Y. 1999). In the alternative, the movant must show a need to correct clear error or prevent manifest injustice. *Id.* Plaintiff has not carried his burden as movant. He has pointed to no controlling decisions that the Court overlooked, let alone that might have materially influenced the Court. He has

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[1] Plaintiff, erroneously operating under a superseded set of this Court's Individual Rules of Practice, filed his papers when the motion was fully briefed. Accordingly, the Court accepts the service date of the moving papers as the operative date under Rule 59(e).

presented no facts that might have materially influenced the prior decision. And there is neither clear error in the Order nor any injustice in dismissing plaintiff's complaint. Accordingly, even if the Court were to construe the instant motion as made under 59(e), and even if the Court were to assume that the instant motion was timely under Rules 6(a) and 59(e), the Court would deny the motion.

Given the Court's denial of plaintiff's request to rescind or vacate the Order, or the judgment resulting therefrom, plaintiff's other requests for relief are denied as moot.

For the reasons set forth above, plaintiff's motion pursuant to Fed. R. Civ. P. 60(b) is denied.

SO ORDERED.

/s/ ALLEN G. SCHWARTZ
Allen G. Schwartz, U.S.D.J.

Dated: New York, New York
April 29, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 00-9311
Filed Nov. 7, 2001

JOHN B. BELL,

Plaintiff-Appellant,

—against—

THE STATE OF NEW YORK, CHEMICAL BANK
and CHASE MANHATTAN BANK, N.A.,

Defendants-Respondents.

Motion for Modification of this Court's Order of 10/16/01
to Reinstate the Appeal,
Pursuant to FRAP 27(a)(3)(b)

MOTION BY:

JOHN B. BELL
Appellant, Pro Se
3400 Foxcroft Road #115
Miramar, FL 33025
1(954) 447-0217 (Home)
1(954) 961-7209

OPPOSING COUNSEL:

J.P. MORGAN CHASE
LEGAL DEPT.
Attorneys for Chemical
& Chase
One Chase Manhattan Pl.
26th Flr.
New York, New York 10081
1(212) 552-0949

MOTION BY:	OPPOSING COUNSEL:
	ATTORNEY GENERAL STATE OF NEW YORK 120 Broadway – 24th Flr. New York, New York 10271 1(212) 416-8594/8610
The consent of opposing counsel has neither been sought nor obtained.	The relief herein has not been sought below.
Service of the within motion has been effected by mail.	No previous application for the relief requested herein has ever been made in the 2d Circuit.
The requested return date is November 19, 2001	An expedited appeal would be dispositive in this motion.
The Appeal was scheduled by an Order, for September 17, 2001	This Court's Order of October 16, 2001 maintains the status quo.

Brief statement of the relief requested: Modification the Court's Order of October 16, 2001, to reinstatement of the scheduled appeal herein.

/s/ JOHN B. BELL
By:
JOHN B. BELL

/s/ JOHN B. BELL
Appearing for: John B. Bell,
Pro Se

Date: November 1, 2001

ORDER

Filed Jan. 4, 2002

Before:

Hon. Jon O. Newman,
Hon. Amalya L. Kearse, *Circuit Judges*,
Hon. Gregory W. Carman*, USCIT

IT IS HEREBY ORDERED that the motion for modification of the order of 10/16/01 be and it hereby is DENIED.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk
by
/s/ ARTHUR HELLER
Arthur M. Heller, Administrative Attorney

Jan. 4, 2002
Date

* Honorable Gregory W. Carman of the United States Court of International Trade, sitting by designation.

Manuel W. Gottlieb, Esq.
Chase Manhattan Bank
Legal Department
26th floor
1 Chase Manhattan Plaza
New York, NY 10081

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 00-9311

JOHN B. BELL,

Plaintiff-Appellant,

—against—

THE STATE OF NEW YORK, CHEMICAL BANK
and CHASE MANHATTAN BANK, N.A.,

Defendants-Respondents.

Renewal Motion for Modification of
This Court Order of 10/16/01 to Reinstate the Appeal
Pursuant to FRAP 27(a)(3)(b)

MOTION BY:

JOHN B. BELL
Appellant, Pro Se
3400 Foxcroft Road #115
Miramar, FL 33025
1(954) 447-0217 (Home)
1(954) 961-7209

OPPOSING COUNSEL:

J.P. MORGAN CHASE
LEGAL DEPT.
Attorneys for Chemical
& Chase
One Chase Manhattan Pl.
26th Flr.
New York, New York 10081
1(212) 552-0949

MOTION BY:

OPPOSING COUNSEL:

ATTORNEY GENERAL
STATE OF NEW YORK
120 Broadway – 24th Flr.
New York, New York 10271
1(212) 416-8594/8610

The consent of opposing counsel has neither been sought nor obtained.

The relief herein has not been sought below.

Service of the within motion has been effected by mail.

A previous application for the relief requested herein has been made to this Court.

The requested return date is November 15, 2001

An expedited appeal would be dispositive in this motion.

The Appeal was scheduled by an Order, for September 17, 2001

This Court's Order of October 16, 2001 maintains the status quo.

Brief statement of the relief requested: This is a renewal of the prior motion for modification the Court's Order of October 16, 2001, for reinstatement of the scheduled appeal herein.

/s/ JOHN B. BELL
By:
JOHN B. BELL

/s/ JOHN B. BELL
Appearing for: John B. Bell,
Pro Se

Date: January 20, 2002

ORDER

Before:

IT IS HEREBY ORDERED that the motion be and it hereby is granted denied.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By: /s/

Date

No._____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN B. BELL,

Petitioner,

Vs.

THE STATE OF NEW YORK, CHEMICAL BANK
And CHASE MANHATTAN BANK, N.A.,

Respondents.

MOTION PURSUANT TO RULE 30.3 TO EXTEND THE TIME IN WHICH TO FILE A WRIT OF CERTIORARI

The petitioner, pursuant to Rule 30(3), respectfully requests an extension of the time in which to file his writ of certiorari.

Petitioner has not previously been granted, nor denied, the relief sought herein.

Petitioner's affidavit in support of this motion is attached hereto.

/s/ JOHN B. BELL
JOHN B. BELL

AFFIDAVIT IN SUPPORT OF THE MOTION FOR AN EXTENSION OF TIME IN WHICH TO FILE A WRIT OF CERTIORARI

I, JOHN B. BELL, am the petitioner in the above-entitled case. In support of my motion for an extension of time, I submit the following facts and circumstances for the Court's consideration:

1. The Writ of Certiorari, to be filed herein, is from an Order of the U.S. Court of Appeals, for the Second Circuit, dated February 21, 2002 (see Appendix A), which denied petitioner's motion for the modification of said Court's Order of October 16, 2001 (see Appendix B), which dismissed an appeal from an Order of the District Court, for the Southern District of New York, dismissing petitioner's Civil Rights action on the ground that same is barred under the Rooker-Feldman Rule (see Appendix C).

2. Petitioner brought the Civil Rights action in the District Court, alleging that his constitutional rights to due process and the equal protection of the law, were violated in a State Court action, captioned *Bell v. New York Higher Education Assistance Corporation*, Chemical Bank and New York Law School, brought in the Supreme Court, New York County (Wilk, J.), and assigned Index No. 28103/83.

3. In the State Court action, petitioner alleged that said Court's finding, that New York Higher Education Assistance Corporation (hereinafter "NYSHESC") was a State agency and therefore entitled to raise the Affirmative Defense of Sovereign Immunity, was not supported in fact or law. Nevertheless said Court, in an Order dated December 4, 1987, dismissed petitioner's action, holding that it

lacked subject matter jurisdiction to hear a case against the State.

4. In 1989, NYSHESC admitted, and the Attorney General corroborated said admission, that it was not, nor have ever been, a State agency when it submitted Departmental Bill #388, asking the New York State Legislature to place it under the Court of Claims Act for money damages suits only. NYSHESC advised the New York State Legislature, in relevant part, that:

> ". . . In a particular recent case involving the state Tuition Assistance Program (TAP) where the corporation took action to halt payments of TAP to the school, it sued the Corporation and others in the U.S. District Court for money damages. Said Court dismissed the action on the grounds that the Corporation was a state agency, asserting it had no jurisdiction. When the Attorney General instituted suit in the New York State Supreme Court on behalf of the Corporation and the state to recover monies back from the school, it counterclaimed for money damages. The court there held that the Corporation was a state agency and the action for money damages would have to be brought in the Court of Claims. However, when the school requested permission of the Court of Claims to file a late claim, that court on its own motion, determined that the Corporation was not an agency of the state and that court had no jurisdiction of the matter. There has been other instances in the past where the position has been taken in the Court of Claims that the Corporation was not a state agency and claims have been dismissed *and in fact one such decision adverse to the Corporations*

position was rendered as recently as September of 1986. . . .". (See Appendix D) (emphases added)

5. These admissions by NYSHESC were corroborated by the Attorney General of the State of New York, in an opinion letter requested by Governor Mario Cuomo wherein he stated, in relevant part, as follows:

". . . Over the past decade, there has been a split in judicial decisions regarding the appropriate court in which to file claims against Higher Education Services Corporation (*New York Higher Education Assistance Corporation's successor*), see, for example, *McAvoy School, Inc. v. Boyle*, unpublished, [Knapp, J., S.D.N.Y. 1980] [barring suit against HESC in federal court and implying Court of Claims would have jurisdiction]; *HESC v. McAvoy Schools, Inc.*, unpublished, [Supreme Ct. Albany Co., Hughes, J., 1983] [Supreme Ct. has no jurisdiction of a counterclaim for money damages against HESC]; *Bell v. HESC*, 138 Misc.2d 932 [Supreme Ct. N.Y. Co., 1987] [Supreme Ct. has no jurisdiction of claim against HESC]; *McAvoy School, Inc. v. State*, unpublished, [Ct. of Claims, Benza, J., filed 4/4/85] [Ct. of Claims has no jurisdiction of a claim for nonpayment of moneys by HESC]; *HESC v. Baker*, 126 Misc.2d 244 [Civil Ct., City of New York, Kings Co., 1984] [implying that that HESC is subject to suit in Supreme Ct.]; and *Brilson v. Control Data Corp.*, unpublished [Supreme Ct. Rensselaer Co., Tavers, J., 1989] [Supreme Ct. does have jurisdiction of a third-party complaint against HESC]. (See Appendix D) (Parenthetical italics and emphases added).

6. The alleged "split in judicial decisions" mentioned by the Attorney General in his letter, never really existed, but was created by the Attorney General failure to follow the law and appeal those decisions that were adverse to NYSHESC's position. The Attorney General appears to have engaged in the type of conduct that this Court condemned in *Blonder-Tongue Labs, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328, 91 S.Ct. 1434, 1442, 28 L.Ed.2d 788 (1971), the repeated litigation of the same issue as long as the supply of unrelated defendants holds out. When the Court of Claims held in *McAvoy School, Inc. v. State*, that NYSHESC was not a State Agency and NYSHESC did not appeal therefrom, it was thereafter precluded from raising that defense, since said issue had already been determined judicially. Of all the cases cited by the Attorney General, only *Bell v. NYSHESC* still holds that NYSHESC is a State agency and that the Supreme Court lacks jurisdiction to hear this case.

7. Predicated upon the foregoing petitioner, pursuant to New York State law, *CPLR*, § 5015, moved the Supreme Court, inter alia, to vacate its Order dismissing the State action on the ground that NYSHESC was a State agency entitled to invoke the State's sovereign immunity. Said motion, and similar motions over the ensuing eleven years, have been similarly denied.

8. Petitioner alleged that his constitutional rights to due process and the equal protection of the law were violated, when the Supreme Court failed and refused to apply New York's Law of Evidence on admissions and vacate its erroneous Order. Petitioner further alleged that his constitutional right to due process was violated, because the Supreme Court's refusal to assume the jurisdiction of this

case imposed upon it by law, left him without a competent legal forum, within the State of New York, with jurisdiction to hear his case against NYSHESC.

9. Petitioner further alleged that 8 NYCRR 2104.4 (eff. 4/12/75-repealed 9/16/96), which the Supreme Court had relied upon in finding that petitioner breached his contract with Chemical Bank, was facially unconstitutional, because it constituted an unlawful exercise of legislative power and exceeded the rule-making authority granted NYSHESC by the New York State Legislature.

10. Pursuant to New York State Law, petitioner served copies of the pleadings raising this constitutional challenge upon the Attorney General of the State of New York. However, the Supreme Court failed and refused to entertain petitioner's challenge to 8 NYCRR 2104.4's constitutionality and failed and refused to require the Attorney General to appear and defend against such a challenge, as is required under New York State's *Executive Law*, §71. As a result thereof, the issue of 8 NYCRR 2104.4 was never adjudicated and therefore, precluded an appeal because New York State's appellate courts may only entertain appeals from orders or judgments of an inferior court. Without an appealable order of judgment, an appellate court lacks jurisdiction to hear an appeal.

11. Petitioner alleged that his constitutional rights to due process and the equal protection of the law were violated, when the said Court refused to adjudicate his challenge to the constitutionality of 8 NYCRR 2104.4 and refused to order the Attorney General to appear and defend said challenge, as required under New York State's *Executive Law*, §71.

12. To prevent further proceedings in *Bell v. NYSHESC*, the Supreme Court granted Chase Manhattan Bank's (Chemical Bank's successor) motion for a permanent injunction, which was joined by NYSHESC (see Appendix E). Chase Manhattan argued that petitioner was barred, under the principles of *res judicata*, from further litigating his claims against the respondents herein. Petitioner opposed the said motion, alleging that such an injunction was unavailable to the respondents as a matter of law.

13. Petitioner alleged that under New York State's Law of Res Judicata, the issuance of such an injunction to Chase Manhattan violated State Law, in that under said law, *res judicata* is not applicable in the same case, nor can any nonfinal order be given a *res judicata* effect. In Burke v. Crosson, 85 N.Y.2d 10, 623 N.Y.S.2d 534, 647 N.E.2d 736 on remand 213 A.D.2d 963, 623 N.Y.S.2d 969, app. and rearg. Den. 1995 WL350085, the New York State Court of Appeals held, in relevant part, that:

> ". . . The concept of finality is a complex one that cannot be exhaustively defined in a single phrase, sentence or writing . . . Nonetheless, a fair working definition of the concept can be stated as follows: a 'final' order or judgment is one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action . . . Thus, a nonfinal order or judgment results when a court decides one or more but not all causes of action in the complaint against a particular defendant . . .". (Id. At pp. 15-16) (emphases added)

14. Fifty-nine years earlier, in *Bannon v. Bannon*, 270 N.Y. 484, 489 (1936) the New York Court of Appeals established that precedent holding, in relevant part, that:

> ". . . This court has said that it is 'only a final judgment upon the merits, which prevents further contest upon the same issue, and becomes evidence in another action between the same parties or their privies. Until final judgment is reached the proceedings are subject to change and modification; are imperfect, and inchoate, and can avail nothing as a bar, or as evidence, until the judgment, with its verity as a record, settles finally and conclusively the questions at issue. . . . .". (Id. At p. _) (emphases added)

The respondents herein have admitted that there were issues raised subsequent to the Supreme Court's Orders of December 4 and 7, 1987 and therefore, they should not have been heard to argue that said Orders finally determined the action between the parties and should have been given a *res judicata* effect.

15. Petitioner alleged that his rights to due process and the equal protection of the law were violated, when the Supreme Court unlawfully issued the permanent injunction, enjoining petitioner from further litigating his claims against NYSHESC and Chase Manhattan Bank, which denied him a full and fair hearing on said issues. The Court of Appeals of the State of New York never reached these issues, because it dismissed the appeal on the ground that the order appealed from did not finally determine the action within the meaning of New York State's Constitution.

16. Petitioner, in an attempt to get the State of New York to rectify the obvious constitutional violations evidence by the State Court record, petitioned Governor George Pataki for his assistance. After almost four months, Governor Pataki referred my requests to the Office of Court Administration, authorizing said agency to take "ANY ACTION YOU DEEM APPROPRIATE" (see Appendix F) Responding to OCA's acknowledgement of the receipt of my letters to Governor Pataki, petitioner wrote to the Hon. Benjamin Steinberg to assure that all requests made of the Governor were under consideration by OCA (see Appendix G).

17. Petitioner respectfully requests that since the fundamental issues involved in the State Court action are now under consideration by OCA, that petitioner's time in which to file a writ of certiorari be extended, from May 21, 2002 to August 21, 2002, to give OCA sufficient time to make its investigations and To take any action that it may deem appropriate and in conformity with the authority vested in it by Governor Pataki.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 30th day of April, 2002.

/s/ JOHN B. BELL

JOHN B. BELL